IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO:16-2018-CA-004625-XXXX-MA
DIVISION: CV-H

JOHN ROBERTSON, JAMES EKIS, and GEORGE TRIEFENBACH, individually and derivatively on behalf of CSX CORP.,

Plaintiffs,

vs.

DONNA M. ALVARADO, JOHN B. BREAUX, PAMELA L. CARTER, STEVEN T. HALVERSON, PAUL C. HILAL, EDWARD J. KELLY, III, JOHN D. MCPHERSON, DAVID M. MOFFETT, DAVID M. RATCLIFFE, DENNIS H. REILLEY, LINDA H. RIEFLER, DONALD J. SHEPARD, MICHAEL J. WARD, J. STEVEN WHISLER, and JOHN J. ZILLMER,

Defendants,

CSX CORP., a Virginia corporation,

Nominal Defendant.
_____/

DEFENDANTS' MOTION TO DISMISS
AND SUPPORTING MEMORANDUM OF LAW

Defendants Donna M. Alvarado, John B. Breaux, Pamela L. Carter, Steven T. Halverson, Paul C. Hilal, Edwards J. Kelly, III, John D. McPherson, David M.

Moffett, David M. Ratcliffe, Dennis H. Reilley, Linda H. Riefler, Donald J. Shepard, Michael J. Ward, J. Steven Whisler, John J. Zillmer, and nominal defendant CSX Corporation move under Florida Rule of Civil Procedure 1.140(b)(6) and Virginia Code § 13.1-672.4(A) to dismiss this action. For the reasons set forth below, the Court should dismiss this action with prejudice.

PRELIMINARY STATEMENT

In this derivative proceeding, three alleged shareholders of CSX Corporation ("CSX" or the "Company") seek to stand in the Company's shoes and sue current and former members of its Board of Directors (the "Board") for supposedly breaching their fiduciary duties by hiring the late E. Hunter Harrison as CSX's President and CEO. Renowned in the railroad industry, Mr. Harrison had implemented his business plan at two other major railroads with great success prior to joining CSX. Ignoring the $22 billion dollar increase in CSX's market capitalization since Mr. Harrison publicly expressed interest in joining CSX, Plaintiffs allege that the Board's decision to hire Mr. Harrison injured CSX. They allege that his compensation and the reimbursement payment made to Mantle Ridge totaling roughly $84 million was "outrageous" in light of Mr. Harrison's untimely death in December 2017. Likewise, Plaintiffs contend that the Board's supposed failure to vet Mr. Harrison's medical condition led to his compensation and the reimbursement being "lost and wasted"

because "a vibrant and fully functioning Harrison was necessary for any possible chance of success," even though CSX's market capitalization has continued to grow by the billions in the months after Mr. Harrison's passing.

The decision to sue, however, is not Plaintiffs' to make. Under the law of Virginia—the state in which CSX is incorporated—shareholders must first make a demand on the board to take action, and then allow the board or a duly appointed committee of disinterested directors to review and evaluate the demand and determine whether litigation is in the corporation's best interests. Va. Code § 13.1-672.4(A).[1] If the board or committee determines in good faith that litigation should not proceed, the Court "shall dismiss" the lawsuit. *Id.* The burden is on the shareholder to plead facts with particularity demonstrating that the statutory requirements have not been met. Va. Code § 13.1-672.4(C).

Of the three Plaintiffs, only John Robertson made a demand on the Board. In response, CSX followed the statutory procedure to the letter, appointing a special committee of disinterested directors (the "Committee") to review and evaluate Robertson's demand. The Committee, in turn, hired independent counsel to advise it in its review and evaluation. After six months, seven meetings, nine witness

[1] Internal citations, quotations, and alterations are omitted unless otherwise noted.

interviews, and the collection and review of 13,000 documents, the Committee completed its review and issued a 44-page report explaining its determination that litigation is not in CSX's best interests (the "Report") (attached hereto as Exhibit A). In the Report, the Committee concluded that Robertson's claims lacked merit because the Board exercised its good faith business judgment and did take steps to vet Mr. Harrison's medical condition, protect CSX against his death or disability, and disclose material facts to shareholders. What is more, the Report noted that the expense and negative impact of pursuing litigation against the Company's directors would outweigh any potential recovery. Although the Complaint explicitly references the Report and questions its conclusions, it pleads no facts—much less with the requisite particularity—establishing that the statutory requirements were not met. Because those requirements have been met, Virginia law requires that this derivative proceeding be dismissed.

In addition, neither James Ekis nor George Triefenbach are proper plaintiffs in this proceeding. Unlike Robertson, they never made the required demand on CSX. *See* Va. Code § 13.1-672.1(B)(1). For this separate reason, they must be dismissed from this lawsuit at the outset if the entire case is not dismissed (which it should be).

For these reasons and those set forth below, this Court should dismiss this action with prejudice and without leave to amend.

STATEMENT OF FACTS

A. The Parties

Plaintiffs allege that they are each shareholders of CSX. Compl. ¶¶ 14–16. Nominal defendant CSX is a Virginia corporation with its principal place of business in Jacksonville, Florida. *Id.* ¶ 16. The individual defendants are current or former directors of CSX that served during or after the time at which Mr. Harrison was hired. *Id.* ¶¶ 17–31.

B. Robertson Makes a Demand on the Board.

On or about December 22, 2017, Robertson sent a demand to the Board, which contained substantially the same allegations contained in the Complaint. *See* Compl. ¶ 32; Derivative Demand Letter, dated January 3, 2018 (the "Demand Letter") (attached hereto as Exhibit B). In the demand as in the Complaint, Robertson asserted that members of the Board breached their fiduciary duties in connection with the decision to hire Mr. Harrison as CSX's President and CEO in March 2017. *See id.* ¶ 1. Robertson insisted that the Board "take suitable action to restore integrity to CSX and recover waste incurred as a result of their reckless and grossly negligent actions." *Id.* ¶ 32.

In January 2017, Mantle Ridge LP ("Mantle Ridge"), an investment fund run by Paul Hilal, announced that it had purchased an approximately 5% stake in CSX, that it was working exclusively with Mr. Harrison (who had just resigned from Canadian Pacific), and that Mr. Harrison expressed interest in becoming the CEO of CSX. *Id.* ¶ 44. Mr. Harrison had made his reputation implementing a business plan known as Precision Scheduled Railroading with several North American railroads, most recently at Canadian Pacific Railway Limited ("Canadian Pacific"). *See* Compl. ¶ 8. Over the next two months, the Board negotiated an agreement with Mr. Harrison and Mantle Ridge, which included hiring Mr. Harrison. *Id.* ¶¶ 44–62. Mr. Harrison then began implementing Precision Scheduled Railroading at CSX. *See id.* ¶¶ 64–65. Unfortunately, Mr. Harrison died in December 2017. *Id.* ¶ 91.

According to Robertson, the Board improperly approved "extraordinary and outrageous" compensation for Mr. Harrison. *Id.* ¶ 3. From the outset, Mr. Harrison and Mantle Ridge had insisted that CSX reimburse Mr. Harrison and Mantle Ridge for vested and about-to-vest compensation and benefits that Mr. Harrison forfeited upon his departure from Canadian Pacific to be released from his non-compete with Canadian Pacific and allow him to work for CSX. *Id.* ¶ 60. Ultimately, the Board put that request to a vote of the shareholders. *Id.* As Plaintiffs concede, the proposal won the support of 93% of the shareholders voting. *Id.* ¶ 7.

Robertson also contended in his demand that the Board "failed to properly vet Harrison's medical condition before agreeing to his demands." *Id.* ¶ 2. At the same time, Robertson simultaneously asserted that the Board "knew about, hid, and outright deceived shareholders about Harrison's ill health and physical infirmities" in advance of the shareholder vote on reimbursement. *Id.* ¶ 8. At bottom, Robertson alleged that CSX "incurred substantial costs to retain and compensate Harrison that are lost and wasted" because "[w]ith Harrison's death, CSX cannot fulfill the promises it made to shareholders." *Id.* ¶ 9.

C. The Board Forms the Special Committee of Disinterested Directors to Review and Evaluate Robertson's Demand.

As authorized by Virginia law, the Board formed the Committee to review and evaluate the allegations made in Robertson's demand and make a binding determination whether litigation would be in CSX's best interests. Compl. ¶ 33; Report at 4–5. The Committee was initially comprised of Edward J. Kelly, III, the Chairman of the Board; Pamela L. Carter; John J. Zillmer; and James M. Foote, the new CEO. Report at 4–5. Shortly thereafter, the Committee retained Richards Layton & Finger P.A., a law firm with extensive experience advising special committees, as independent legal counsel to assist with its review. *Id.* at 6.

Shortly thereafter, the Committee conducted a review to confirm whether each of the Committee's members was disinterested (that analysis will be discussed below). *Id.* at 7. Through this process, the Committee decided that Mr. Foote should not continue to serve on the Committee in light of his position as CEO, and Mr. Foote agreed to step down from the Committee. *Id.* The Committee also confirmed that its remaining members were disinterested under Virginia law. *Id.*

Over the next six months, the Committee conducted its review. The Committee gathered thousands of documents from CSX, interviewed nine witnesses, and met seven times. Report at 7–9. As the review progressed, the Committee's counsel updated Robertson's counsel as to when the Committee expected to complete its review. Compl. ¶ 35.

On April 11, 2018, before the Committee could complete its review, Robertson commenced a derivative proceeding in the United States District Court for the Middle District of Florida. Compl. ¶ 37. The federal court dismissed that complaint *sua sponte* for pleading defects, with leave to refile, which Robertson did on May 14, 2018. Report at 4. Robertson subsequently voluntarily dismissed that action for lack of subject matter jurisdiction on July 6, 2018. *Id.*

D. The Committee Concludes that Litigation Is Not in the Best Interests of CSX.

On June 28, 2018, the Committee completed its review and provided the Report to the Board. Compl. ¶ 40. CSX also furnished the Report to Robertson. *See id.* In the Report, the Committee determined that pursuing derivative litigation based on the allegations raised in Robertson's demand letter would not be in the best interests of CSX or its shareholders. *Id.* The Committee concluded unanimously that "[t]he process through which Mr. Harrison became CEO of CSX and the negotiations with Mantle Ridge were the results of rational, disinterested, independent, and good faith decision-making processes"; that "[t]he Company's public disclosures during the relevant period accurately reflected the Board's knowledge"; and that, as reflected in the dramatic increase in the trading price of CSX stock, Mr. Harrison "led a transformational change to the Company's operations that rapidly and sustainably provided enormous value to the Company's stockholders." Report at 42–44.

Robertson commenced this derivative proceeding on July 13, 2018. Even though Robertson had received the Report, the Complaint is almost identical to the complaint filed in federal court. Indeed, the Complaint names the same defendants as the prior federal lawsuit, raises "virtually the same" claims, and is "based on the same underlying allegations of misconduct." Compl. ¶ 37. Although Plaintiffs allege that Robertson made a demand on the Board and that the Committee reviewed and refused

to act on his demand, they plead no facts suggesting why the Committee's determination should not be dispositive as required by Virginia law.

ARGUMENT

A defendant may move to dismiss a complaint when it fails to state a cause of action. Fla. R. Civ. P. 1.140(b)(6). The Court may consider the allegations in the Complaint, documents attached to the complaint, and documents that the complaint "impliedly incorporates" by reference. *Veal v. Voyager Prop. & Cas. Ins. Co.*, 51 So. 3d 1246, 1249–50 (Fla. 2d DCA 2011). When such documents "conclusively negate a claim, the pleadings can be dismissed." *Magnum Capital, LLC v. Carter & Assocs., LLC*, 905 So. 2d 220, 221 (Fla. 1st DCA 2005). Here, the Complaint impliedly incorporates the Demand Letter and the Report. *See* Compl. ¶¶ 32, 40-41.

A. Virginia Law Governs This Case Because CSX Is Incorporated in Virginia.

In his Complaint, Plaintiff invokes the Florida statute governing derivative proceedings, though he previously invoked Virginia law in connection with his demand. *See* Compl. ¶¶ 10–11; Demand Letter (demand made "pursuant to Chapter 9, Article 8.1 of the Virginia Stock Corporation Act, Va. Code. Ann. § 13.1-672.1"). Regardless, black letter law dictates that the Florida statute has no application here because CSX is a Virginia corporation.

Florida has adopted the internal affairs doctrine. *Chatlos Found., Inc. v. D'Arata*, 882 So. 2d 1021, 1023 (Fla. 5th DCA 2004). That doctrine "recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands." *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982). To that end, the Florida Business Corporation Act states expressly that the "act does not authorize this state to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state." Fla. Stat. § 607.1505(3).

This case involves the internal affairs of a Virginia corporation because it is a derivative proceeding. A derivative proceeding is "a limited exception to the usual rule that the proper party to bring a claim on behalf of a corporation is the corporation itself, acting through its directors or the majority of its shareholders." *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 531–32 (1984). Only if the shareholder complies with the statutory requirements for bringing and maintaining a derivative proceeding may that shareholder "step into the corporation's shoes and [] seek in its right the restitution he could not demand in his own." *Id.* at 528. Foremost among these requirements, a shareholder must make a demand on the board of directors to take

the requested action, thereby "afford[ing] the directors an opportunity to exercise their reasonable business judgment and waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96 (1991). The demand requirement therefore "delimit[s] the respective powers of the individual shareholder and of the directors to control corporate litigation." *Id.*

B. The Committee Satisfies the Statutory Requirements for Dismissal.

Derivative proceedings on behalf of Virginia corporations are governed by specific provisions of the Virginia Stock Corporation Act. *See* Va. Code §§ 13.1-672.1 *et seq.*[2] In relevant part, Virginia law states that "[n]o shareholder may commence a derivative proceeding until: (1) A written demand has been made on the corporation to take suitable action; and (2) Ninety days have expired from the date delivery of the demand was made . . . ." Va. Code § 13.1-672.1(B). Here, Robertson's December 2017 letter met the demand requirement and waiting period as it pertains to his ability to file a derivative lawsuit.

In turn, Section 13.1-672.4(A) sets forth the procedure for how Virginia corporations may respond to a demand. It prescribes both the type of review and

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[2] For the Court's convenience, the relevant statutory provisions are attached as Appendix A.

evaluation to be undertaken and the right to dismissal of derivative proceedings based upon that review:

> A derivative proceeding shall be dismissed by the court on motion by the corporation if one of the groups specified in subsection B or E has:
>
> 1. Conducted a review and evaluation, adequately informed in the circumstances, of the allegations made in the demand or complaint;
>
> 2. Determined in good faith on the basis of that review and evaluation that the maintenance of the derivative proceeding is not in the best interests of the corporation; and
>
> 3. Submitted in support of the motion a short and concise statement of the reasons for its determination.

Va. Code § 13.1-672.4(A). The statute authorizes a special committee of "two or more disinterested directors" to make this determination. Va. Code § 13.1-672.4(B)(2).[3]

The Virginia statute states that the Court "shall dismiss" on the corporation's motion. Va. Code § 13.1-672.4(A). So long as the statutory requirements of subsection A are satisfied, the committee's determination is "dispositive." *Luzak v.*

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[3] Section 13.1-672.4(E) permits the court, upon motion of the corporation, to appoint a panel of independent persons to make a determination as to whether maintenance of the derivative proceeding is in the best interests of the corporation. Because CSX created the special committee, this provision has no relevance to the instant case.

Light, No. 115CV501AJTIDD, 2016 WL 3854118, at *3 (E.D. Va. July 8, 2016), *aff'd*, 678 F. App'x 180 (4th Cir. 2017).

The Virginia statute also imposes specific and heavy burdens of pleading and proof on the shareholder in order to avoid dismissal. Under Virginia law, if a board or committee rejects a shareholder demand (as here), the shareholder "shall allege with particularity facts establishing that the requirements of subsection A have not been met." Va. Code § 13.1-672.4(C). Moreover, the shareholder is required to plead such facts at the outset of the case, and the shareholder is "entitled to discovery with respect to the issues presented by the motion only if and to the extent that the complaint alleges such facts with particularity." *Id.* (emphasis added). Similarly, "[t]he plaintiff shall have the burden of proving that the requirements of subsection A have not been met, except that the corporation shall have the burden with respect to the issue of independence under subsection B if the complaint alleges with particularity facts raising a substantial question as to such independence." Va. Code § 13.1-672.4(D).[4]

As explained below, the Committee was composed of disinterested directors, and all three requirements of subsection A are met. The complaint, therefore, must

[4] In *Luzak*, the Eastern District of Virginia "considered and rejected [plaintiff's] contentions that there is a separate obligation of 'independence' separate and apart from 'disinterestedness.'" 2016 WL 3854118, at *4, n.6.

be dismissed. Indeed, Plaintiffs plead no cognizable facts challenging the disinterestedness of the Committee, and do not even attempt to plead facts showing that the requirements of subsection A have not been met, let alone with the requisite particularity. Nor could they meet this heavy burden, given the Committee's report describing its investigation. As a result, the complaint must be dismissed with prejudice.

1. The Committee Was Comprised of Disinterested Directors.

The statute requires that, at the time the determination was made, the Committee be comprised of "two or more disinterested directors appointed by a majority vote of disinterested directors present at a meeting of the board of directors." Va. Code § 13.1-672.4(B)(2). In relevant part, the Virginia Stock Corporation Act defines a "disinterested director" as "a director who, at the time action is to be taken under § 13.1-672.4 . . . does not have (i) a financial interest in a matter that is the subject of such action or (ii) a familial, financial, professional, employment or other relationship with a person who has a financial interest in the matter, either of which would reasonably be expected to affect adversely the objectivity of the director when participating in the action." Va. Code § 13.1-603. In the Complaint, Plaintiffs make only one attack on the disinterestedness of the Committee members, contending that its three members were conflicted because they were "all Defendants in the Federal

Action and in this case" and were "all named as alleged wrongdoers in the Demand." Compl. ¶¶ 38–41.

Virginia law expressly rejects Plaintiffs' argument. The statutory definition of a "disinterested director" lists a series of circumstances that "shall not by itself prevent a person from being a disinterested director." Va. Code § 13.1-603. These circumstances include a director's "status as a named defendant, as a director against whom action is demanded, or as a director who approved the act being challenged." *Id.* Applying the plain language of the statute, courts have rejected the argument that directors "are not disinterested due to their membership on the Board that approved the Transaction." *Luzak*, 2016 WL 3854118, at *4. If Plaintiffs' allegations were enough to disqualify the directors from serving on the Committee, the rules governing derivative suits would be gutted.

The Report confirms that a thorough review was undertaken and that the Committee was comprised of disinterested directors. Before beginning its review of Robertson's demand, the Committee met with its independent counsel to review the disinterestedness of each of its members. Report at 6–7. The Committee concluded that Mr. Foote should not remain on the Committee because his position as CEO "presented a risk of a conflict of interest." *Id.* at 7.

After investigating potential interestedness of the members of the Committee, the Committee did not discover "any financial interest of any of its members, or a familial, financial, professional, employment, or other relationship of any of its members with an individual who has a financial interest, with respect to the issues presented in the Demands." *Id.* The Committee therefore concluded that "[e]ach of the members of the Committee should be considered independent and disinterested for purposes of reviewing, evaluating and responding to the Demands." *Id.* Plaintiff offers no facts to challenge this conclusion.

2. The Committee Met the Requirements of Subsection A.

a. The Committee Was Adequately Informed.

For dismissal, the statute required the Committee to "[c]onduct[] a review and evaluation, adequately informed in the circumstances, of the allegations made in the demand or complaint." Va. Code § 13.1-672.4(A)(1). This provision "is a statutory mandate to understand the specific nature of and alleged factual basis for a shareholder's allegations." *Luzak*, 2016 WL 3854118, at *5. It does not "impose on a special committee an inflexible obligation to exhaust all possible sources of relevant facts before reaching a conclusion as to the central issue it faces—whether to pursue derivative claims." *Id.*

The Complaint alleges that "[t]he Committee's investigation and report are nothing more than a whitewash," Compl. ¶ 41, but Plaintiffs plead precious few allegations, and none with cognizable particularity, to support this assertion. Plaintiffs' only specific argument is that "[t]he Committee and its counsel made no attempt to seek Robertson's input into the investigation that was conducted," *id.* ¶ 41, but Plaintiffs fail to explain why such input was necessary for the Committee to "understand h[is] allegations, claims, or what []he alleged as the factual basis for those allegations and claims." *Luzak*, 2016 WL 3854118, at *6. On the contrary, the Complaint alleges that Robertson submitted a lengthy demand to the Board that set forth his claims in detail. Compl. ¶ 32. The Complaint also fails to identify any allegations that were not considered by the Committee.

Moreover, the Report makes clear that the Committee "thoroughly investigated" each of the topics raised in Robertson's demand, including:

- The Board's decision to hire Mr. Harrison and the terms of his employment;
- The Board's knowledge of Mr. Harrison' health;
- The negotiations between CSX and Mantle Ridge;
- The reimbursement of certain money in connection with Mr. Harrison's agreement with Mantle Ridge;

- The Board's decisions to make or not make certain disclosures to stockholders; and

- The Company's performance under Mr. Harrison and after his death.

Report at 8. At the Committee's request, CSX "provided the Committee with almost 13,000 documents amounting to over 110,000 pages," including minutes of Board and committee meetings, corporate governance documents, and numerous internal documents and communications. *Id.* at 8–9. The Committee also "met seven times to consider issues raised by the Demands" and "conducted nine interviews of current directors of the Company and third-parties." *Id.* at 8. These steps were more than sufficient to render the Committee "adequately informed in the circumstances." Va. Code § 13.1-672.4(A)(1).

b. The Committee Made its Determination in Good Faith.

Next, the statute mandates dismissal when a committee has "[d]etermined in good faith on the basis of that review and evaluation that the maintenance of the derivative proceeding is not in the best interests of the corporation." Va. Code § 13.1-672.4(A)(2).

Although Plaintiffs suggest that this litigation should proceed because they believe the Committee's determination was wrong, Compl. ¶ 41, dismissal of this

litigation does not turn on whether the Committee's decision was "correct" or whether Plaintiffs agree with the decision. Instead, the good faith requirement draws directly from Virginia's statutory standard of conduct for directors. *See Luzak*, 2016 WL 3854118, at *8. Under Virginia law, "[a] director shall discharge his duties as a director, *including his duties as a member of a committee*, in accordance with his good faith business judgment of the best interests of the corporation." Va. Code § 13.1-690(A) (emphasis added). "[I]n Virginia, a director's discharge of duties is not measured by what a reasonable person would do in similar circumstances or by the rationality of the ultimate decision. Instead, a director must act in accordance with his/her good faith business judgment of what is in the best interests of the corporation." *Willard v. Moneta Bldg. Supply, Inc.*, 515 S.E.2d 277, 284 (Va. 1999). Compliance with that statutory standard "provides a safe harbor that shields a director from liability for any action taken as a director, and for failure to take action." *Id.* (citing Va. Code § 13.1-690(C)). Accordingly, Plaintiffs cannot "prove lack of good faith in the instant case by showing that, based upon the substantive information received by the . . . [Committee], the [Committee] should have reached a different result." *WLR Foods, Inc. v. Tyson Foods, Inc.*, 65 F.3d 1172, 1185 (4th Cir. 1995) (applying Virginia law).

Without their ill-founded attack on the Committee's conclusions, the Complaint is left with no facts suggesting that the Committee made anything other than a good faith determination in the best interests of the corporation. As laid out in the Report, over the course of approximately six weeks (from January 18, 2017 to March 6, 2018), the Board weighed numerous factors in determining whether to hire Mr. Harrison as CSX's next CEO. These factors include:

- The Board engaged in extensive discussions with Mr. Harrison before he was hired in which Mr. Harrison discussed the benefits of PSR and its potential implementation at CSX. Report at 14.

- As soon as the market became aware of Mr. Harrison's interest in becoming CEO, *CSX's stock price gained 23% in 24 hours*. Report at 13–14. In light of the *$10 billion increase* in CSX's market capitalization following their announcement, Mr. Harrison and Mantle Ridge had considerable leverage during the negotiation process. *Id.*

- Although Mr. Harrison declined to provide his medical records before he was hired, *id.* at 15, the Board sought and received a letter from Mr. Harrison's physician stating that Mr. Harrison was "quite capable of performing as an intense chief executive officer." *Id.* at 16.

- The Board took into account any uncertainties regarding Mr. Harrison's health by negotiating vesting conditions to Mr. Harrison's options that subjected those options "to forfeiture or cancellation in the event of Mr. Harrison's termination due to death or disability before the first anniversary of his employment." Report at 16; *see also* Compl. ¶ 58 (alleging that options were "subject to certain vesting provisions").

- Prior to approving Mr. Harrison's compensation and reimbursement package, the Board conducted further due diligence on Mr. Harrison's health, receiving a report from Mr. Harrison's physician that he had no reason to believe that Mr. Harrison was not capable of working as CEO of CSX for the duration of his contract term. Report at 24.

- The Board disclosed fully its knowledge about Mr. Harrison's health prior to the shareholder vote approving overwhelmingly the compensation and reimbursement packages. Through press reports and CSX's subsequent public filings, shareholders "were aware prior to the vote that Mr. Harrison was a man of advanced age, who had some health issues, and sometimes relied on supplemental oxygen." *Id.* at 25–27. As the Committee explained, "at all times relevant to the advisory vote the stockholders had the same material information as the Board." *Id.* at 26.

- As a result of the protections negotiated by the Board, except for the $84 million reimbursement that had been "approved in an advisory vote by the stockholders," only approximately $6 million was paid to Mr. Harrison or his estate in compensation. Report at 17.

The Report also nullifies Plaintiffs' assertion that "[w]ith Harrison's death, CSX cannot fulfill the promises made to shareholders." Compl. ¶ 9. Specifically, the Report notes the key improvements in CSX's performance. Notably, implementation of Mr. Harrison's PSR plan led to a 19% improvement in train velocity, and an over 11% improvement in terminal dwell time, two of the most important metrics for determining rail network efficiency. Report at 29-30. The Company's earnings and operating ratios also improved under Mr. Harrison's tenure, and have continued to improve since his passing. In the first quarter of 2017, CSX's earnings per share and operating ratio were $0.39 and 75.2%, respectively. CSX's first quarter 2018 earnings per share and operating ratio were $0.78 and 63.7%, respectively, a significant improvement in both metrics. *Id.*

The performance of the Company's stock has shown similar growth. The day after Mr. Harrison's passing, CSX's stock closed at $53.59, "well above the price prior

to Mr. Harrison's announced interest in CSX." Report at 27. Moreover, with Mr. Foote at the helm implementing Mr. Harrison's business plan, CSX's stock price has continued to climb. "As of the date of th[e] Report, CSX's stock closed at $63.59, 28.49% higher than when Mr. Harrison was appointed CEO" or, in terms of market cap, an additional $12 billion on top of the $10 billion brought by the news of Harrison's interest in being CEO. *Id.* at 13, 29.[5]

Indeed, given the Company's performance since the hiring of Mr. Harrison, the Committee found that "the value Mr. Harrison brought to the Company far surpasses the costs associated with acquiring his services." Report at 39. Moreover, as the Committee also recognized, even assuming that the Plaintiffs' claims had merit, the expense of pursuing such an action and the potential negative impact that litigation would have on the Company would "outweigh any potential monetary recovery." *Id.* at 40. The Committee was well within its rights to take these factors into account. *See Luzak*, 2016 WL 3854118, at *5 ("The merits of a shareholder's allegations are undoubtedly a central consideration, but that determination is also driven by a wide range of other considerations."); *Daily Income Fund*, 464 U.S. at 532 ("whether or

[5] Since then, as a quick Internet search would show, the Company has continued to show significant improvement as reflected in the Company's continued stock growth and further multi-billion dollar market cap increase.

not a corporation shall seek to enforce in the courts a cause of action for damages" is a "business question[]").

c. The Committee Has Provided Robertson and the Court With a Report Explaining Its Determination.

Finally, the statute required CSX to "[s]ubmit[] in support of the motion a short and concise statement of the reasons for its determination." Va. Code § 13.1-672.4(A)(3). The Report, which spans 44 pages and addresses Robertson's claims in great detail, more than fulfills this basic requirement. *See Luzak*, 2016 WL 3854118, at *8 (a 46-page report that "addresses each of [the shareholder's] claims . . . . clearly satisfies 13.1-672.4(A)(3)'s requirement").

C. Ekis and Triefenbach Are Not Proper Plaintiffs Because They Never Made a Demand on the Board.

Finally, neither Ekis nor Triefenbach are proper plaintiffs. The Virginia Stock Corporation Act states expressly that "[n]o shareholder may commence a derivative proceeding until [a] written demand has been made on the corporation to take suitable action." Va. Code § 13.1-672.1(B)(1). This requirement applies "without exception." *Firestone v. Wiley*, 485 F. Supp. 2d 694, 701 (E.D. Va. 2007) (granting a motion to dismiss derivative claims for failure to make a demand).

Here, the Complaint alleges that Robertson made a demand, Compl. ¶ 32, but it makes no such allegations as to Ekis or Triefenbach. *See id.* ¶¶ 14–15. Having failed to comply with this threshold statutory requirement, neither Ekis nor Triefenbach may maintain this derivative proceeding.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court dismiss this action. Moreover, Defendants request that the Complaint be dismissed with prejudice. This Complaint is Plaintiffs' third bite at the pleading apple in light of the preceding federal court filings. Armed with ample public and non-public detail, from Board minutes to support his federal complaint, to the Report now, Plaintiffs fail to plead facts, let alone with particularity establishing that the Committee's process did not satisfy the statutory requirements. Because that failure makes it "apparent that the claim cannot be cured by amendment," *Magnum Capital*, 905 So. 2d at 221, Plaintiffs should not be given another opportunity to protract this litigation further. Instead, the Court should dismiss this action with prejudice and without leave to amend.

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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 2018, a true and correct copy of the foregoing has been electronically filed with the Clerk of the Court by utilizing the Florida Courts E-Filing Portal, which will send a notice of electronic filing via email to the following:

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s/Henry M. Coxe, III

Exhibit A

filed under seal

Exhibit B

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December 22, 2017

VIA FEDEX

Board of Directors
CSX Corporation
500 Water Street, 15th Floor
Jacksonville, FL 32202

Re: **Shareholder Demand on CSX Board of Directors**

Board of Directors:

John Robertson, who is, and at all times relevant to the issues addressed in this letter was, a beneficial owner of shares of CSX Corporation ("CSX" or the "Company") has retained our law firm for the purpose of making a demand on the Board of Directors (the "Board") pursuant to Chapter 9, Article 8.1 of the Virginia Stock Corporation Act, Va. Code Ann. § 13.1-672.1 (the "Demand").

DEMAND FOR RELIEF

This Demand is made in view of the Board of Directors' (the "Board") apparent misconduct in connection with the hiring of now-deceased E. Hunter Harrison ("Harrison") as CSX's CEO and President, and the agreement to his outrageous compensation and other demands, as detailed below. The Board's improper acts include: its failure to properly vet Harrison's medical condition before agreeing to his demands; its reckless agreement to Harrison's wasteful compensation demands and the demand to add conflicted Board members; and its false and misleading proxy statements filed in connection with the Special Advisory Vote on Harrison's "reimbursement" compensation (as well as the new Board member election). These actions have caused severe harm and damage to CSX and require immediate remedy.

In short, to restore integrity to the Company, and ameliorate the injury incurred by the Company as a result of the Board's wrongful acts, the Demand requests: (i) that you immediately announce your resignations and schedule a Special Election for the appointment of new, unconflicted directors; (ii) that you cause an independent investigation to be made with respect to the misconduct described below; (iii) that action be taken to collect from current Board members, Harrison's estate, Mantle Ridge LP and/or any other potentially liable parties reimbursement of compensation paid to, or on behalf of, Harrison, including, but not limited to, the $84 million of "reimbursement" compensation; (iv) that CSX restore previous by-law provisions governing the age of its CEO and/or requiring pre-hiring health reviews as a condition for employment and/or annual health reviews as a condition for compensation; (v) that you institute corporate governance provisions that limit or benchmark CEO and other senior executive total compensation so that it is not excessive; (vi) that you cause an accounting to be provided to shareholders for all related and consequential expenses and costs incurred by CSX (including costs for proxy statements) in relation to Harrison's hiring and tenure; and (vii) that the Board institute further corporate governance initiatives to ensure that such conduct and damage to the Company do not recur. This relief is the minimum necessary to repair the damage caused to CSX and its shareholders at this time.

BACKGROUND FOR THE DEMAND

CSX is one of the largest railroad service providers in the United States, with over 27,000 employees and $11 billion in annual revenues. The members of the Board are Donna M. Alvarado, John B. Breaux, Pamela L. Carter, Paul C. Hilal, Edward J. Kelly, III, John D. McPherson, David M. Moffett, David M. Ratcliffe, Dennis H. Reilley, Linda H. Riefler, Donald J. Shepard, J. Steven Whisler, and John J. Zillmer.

Harrison's Brief Tenure as CEO Comes to an Abrupt End

On December 15, 2017, Harrison, CSX's CEO passed away. Only two days earlier, on December 13th, CSX announced that he was taking "medical leave." Both announcements roiled CSX's stock price which fell nearly 10% from over $58 per share, to $53 per share, on the news.

Harrison's passing reveals that CSX's Board members knew about and hid his ill health and physical infirmities from shareholders. In fact, CSX seems to have outright deceived its shareholders about Harrison's health and physical condition. This deception is outrageous considering that the Board has trumpeted Harrison's singular resume and expertise as a railroad "turnaround expert" who would personally lead CSX's turnaround as he had done at other companies.

Since his hiring, the Board has championed Harrison to improve CSX's operating ratio. The Board described Harrison as a lifelong railroad man who originated "Precision Scheduled Railroading," a concept designed to improve operating efficiency. Harrison's capability of executing and implementing his "Precision Scheduled Railroading" concept

within CSX during his tenure was apparently the Board's entire justification for changing its past policies and granting his excessive compensation and other demands.

His death materially changes CSX's plans and outlook for the future. Harrison is not present and able to execute his turnaround plans, which require a CEO with his experience and qualities to implement. The Board was well aware that a vibrant and fully functioning Harrison was necessary for any possible chance of success. The Board's compensation agreement with Harrison contemplated his four-year tenure at a minimum.

With Harrison's death, CSX cannot fulfill the promises it made to shareholders. CSX has also incurred substantial costs to retain and compensate Harrison that are lost and wasted, and it has adopted governance changes that compromised the Company's—and the Board's—integrity. Unfortunately, the consequences from Harrison's death could have been avoided had the Board acted properly and not engaged in gross misconduct.

The Board's Reckless Hiring and Concessions to Harrison's Outrageous Demands

On February 14, 2017, CSX issued a press release (a copy of which is attached hereto as **Exhibit A**) that the Board was calling for a special meeting of shareholders in connection with the hiring of Harrison as its new CEO. The Board described how it had been approached by a shareholder acting on behalf of Harrison and the discussions to date over his hiring. The Board even provided detail about the "extraordinary" demands necessary to procure Harrison.

Apparently, on January 18, 2017, Mantle Ridge LP, a hedge fund run by Brian Hilal ("Hilal"), who was formerly at Pershing Square,[1] advised the Board that it had become a CSX shareholder of less than five percent and that it had an exclusive arrangement to work with Harrison, who left Canadian Pacific that same day. Mantle Ridge advised the Board that Harrison was "eager to become CEO of CSX" and "in light of Mr. Harrison's experience and accomplishments, however, the CSX Board quickly engaged in extensive discussions with Mr. Harrison and Mantle Ridge." The Board states that there was a meeting which lasted more than five hours.

The Board details the "extraordinary" demands made by Harrison and Mantle Ridge for his hiring as CEO, which included a four-year agreement with total compensation that had an estimated cost of $300 million and significant changes to CSX's Board composition. Included within Harrison's specific compensation demands was a request for CSX to pay **$84 million** as reimbursement for payments Harrison would choose to forgo at Canadian Pacific and related tax indemnity. Harrison also declined CSX's request for a medical review by an independent medical consultant.

The Board even acknowledged its concerns over Harrison's demands; however, it

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[1] While at Pershing Square, Hilal ran the same gambit with Harrison by placing him at Canadian Pacific. Hilal evidently sought to cash in on this routine a second time by placing Harrison at CSX.

offered him the position with "compensation that fully reflects his experience and accomplishments" and offered to appoint Hilal and three others from Mantle Ridge to the Board. Still, the Board called for a special meeting of shareholders, purportedly for guidance on the further specific and "exceptionally unusual if not unprecedented" compensation requests for Harrison and Mantle Ridge's demands for Board changes. The Board stated that it would not recommend for or against the proposals.

However, shortly thereafter, on March 6, 2017, the Board took a portion of the decision away from shareholders. In a press release (a copy of which is attached hereto as **Exhibit B**), the Board announced that it had hired Harrison as CEO and acceded to many of his demands. The Board agreed to Harrison's salary and bonus demands, and it awarded him options to purchase nine million shares of CSX stock at the current stock price, subject to certain vesting provisions.

The Board also agreed to appoint Hilal and four others selected by Mantle Ridge to the Board, which has 13 members, provided that Mantle Ridge continue to maintain a minimum stock ownership percentage. Hilal was also appointed Vice Chairman of the Board. These new Board members were highly conflicted considering that they owed their appointment to Mantle Ridge.

The Board ostensibly decided to seek shareholder input on the demand for $84 million in "reimbursement" compensation and the related tax indemnity before agreeing to these payments. CSX's press release states that "Mr. Harrison has indicated that he will resign after the 2017 meeting if the reimbursement and tax indemnity are not provided by CSX and return to Mantle Ridge to protect his reimbursements." But, by already hiring Harrison, the Board left shareholders without much agency.

The Board acted recklessly and/or with gross negligence by prematurely hiring Harrison before the $84 million "reimbursement" issue was resolved. By deferring this issue to shareholders, and informing them that he would quit if his request was not granted, the Board had effectively hired Harrison already. The shareholder vote was simply a way for the Board to obtain cover for conceding to Harrison's excessive compensation demands.

The Board also hired Harrison without sufficiently vetting his health condition and his physical capability of fulfilling his duties as CEO. CSX's various agreements with Harrison and Mantle Ridge contain no provisions requiring that Harrison submit to a medical review or making this a condition of his employment. Upon information and belief, all CSX employees must submit to a physical and/or health exam as a condition of their employment. The Board violated ordinary CSX employment policy by hiring Harrison without sufficient vetting or review of his health.

False and Misleading Proxy Statements Lead to Shareholder Approval

After hiring Harrison, the Board and Mantle Ridge collaborated in a false and misleading campaign to win a shareholder endorsement of the $84 million of

"reimbursement" compensation. Both issued false and misleading statements in shareholder communications and proxy statements about Harrison's capability to deliver and implement his "turnaround" plans at CSX. The Board and Mantle Ridge omitted material disclosure of the fact that Harrison was in seriously ill health, which limited him physically and required use of an oxygen tank, and that, therefore, there was a high probability that his tenure as CEO would be short-lived and he would not be able to deliver and execute his strategic plans.

CSX's March 6, 2017 press release to announce Harrison's hiring contained the following quotes and biographical information demonstrating how material and fundamental Harrison's capability to execute his strategy was to CSX's decision to hire him and the perceived value he would bring to the Company:

> Hunter Harrison, said "I am proud to join the dedicated and talented railroaders at CSX. Together, we will implement Precision Scheduled Railroading – a model proven to improve safety, create better service for customers, produce a proud and winning culture for employees and generate exceptional, lasting value for shareholders."
>
> Paul Hilal, said "I thank every CSX director, including those leaving the Board, for their constructive and skillful engagement that enabled this terrific outcome for CSX. The Board is united behind a shared goal – creating value for shareholders and all stakeholders by implementing the Precision Scheduled Railroading mode at CSX. Together, we have created the conditions for success. Now the real work begins."
>
> ***
>
> **E. Hunter Harrison**
>
> E. Hunter Harrison is the most effective and successful railroad leader of our times, having successfully led the turnaround of three major railroads over the last 25 years. In his last two undertakings at Canadian National and Canadian Pacific, he delivered 321% and 350% total shareholder return, respectively.
>
> Mr. Harrison created and refined Precision Scheduled Railroading over the recent decades, and is the acknowledged lease in implementing it as Class I railroads. He has been recognized by every major railroading publication and he has twice been honored as Railroader of the Year.

On April 3, 2017, CSX, "by order of the Board of Directors," filed its preliminary proxy statement for the annual meeting (an excerpt of which is attached hereto as **Exhibit C**), which discussed the election of the newly added directors, as well as "Item 5," the shareholder vote on Harrison's compensation. Although it took no position on the vote, CSX presented the list of "Pros/Cons." *See* Ex. C at 83. Again, this list demonstrates that Harrison's capability of delivering on his strategy plans was material to his value to CSX, and that any inability to do so would pose a major risk. The Board failed to specifically disclose its knowledge of Harrison's serious health issues and physical limitations, which it knew (or was reckless in not knowing) were material to the shareholder vote.

Also on April 3, 2017, Mantle Ridge filed its own preliminary proxy statement recommending that shareholders vote for Harrison's reimbursement. Mantle Ridge stressed Harrison's past track record of turnarounds at three major railroads and states:

> He achieved these results by transforming each of these railroads from more traditional operating models to the Precision Scheduled Railroading model **he created and refined over his career.** Railroads operating under this model perform far better than railroads operating under traditional models. **Mr. Harrison is the only person to have effected such a transformation at a Class I railroad. As CEO, Mr. Harrison intends to effect the same transformation at CSX.**

Mantle Ridge's statements emphasized that Harrison's strategy is personal to him and has not been duplicated by other CEOs. Mantle Ridge failed to disclose any specific knowledge of Harrison's serious health issues, which it knew were material to the shareholder vote.

On April 27, 2017, Mantle Ridge filed additional proxy materials with the SEC, which included a lengthy PowerPoint presentation to recommend that shareholders vote to "retain Harrison" (an excerpt of which is attached hereto as **Exhibit D**). Mantle Ridge posted its presentation on the website www.CSXAdvisoryVote2017.com with the apparent knowledge and approval of the Board.

Mantle Ridge's presentation further reinforced the fact that Harrison's health and capability of delivering on his plans was highly material while it failed to truthfully disclose his present medical state. Instead, the presentation made false and misleading statements to suggest that Harrison could deliver results to the Company. *See, e.g.*, Ex. D. Moreover, Mantle Ridge's Presentation also presents data that reflect that his transformation (and increased value) took ***multiple years*** for sustained results. Again, no specific disclosures were made of Harrison's serious health issues or physical limitations, which would call into question his capability to deliver on his plans over the next four years.

On May 17, 2017, the *Wall Street Journal* ran an article concerning Harrison's health and his capability of performing his duties as CEO. The article stated that Harrison used oxygen and worked from home several days per week. The article also stated that the

72-year-old Harrison stated that doctors have given him the OK to work and that "**his fellow CSX board members are aware of his medical condition.**"

On May 19, 2017, in immediate rebuttal, CSX, again at the behest of the Board, filed additional proxy material in connection with its proxy statement for the shareholder vote, which stated in relevant part:

> On May 17, 2017, the Wall Street Journal published a story related to the health of E. Hunter Harrison, Chief Executive Officer and President of CSX Corporation. In an interview, Mr. Harrison told the Wall Street Journal, "I'm having a ball and I'm running on so much adrenaline that no one can stop me." He also said, "Don't judge me by my medical record, judge me by my performance." Further, Mr. Harrison said, "There are times when I get a little shortness of breath so I take oxygen and it helps. Sometimes I get a cough and the oxygen makes it go away."
>
> CSX said, "In the absence of performance questions, as a matter of policy we do not comment on health related matters of any CSX executive." CSX further said Mr. Harrison "has been and continues to be actively and deeply involved on a daily basis."

This filing of additional proxy materials represented yet another opportunity where the Board failed to disclose the known truth about Harrison's serious medical condition and physical limitations. By filing the response to the *Wall Street Journal* article, the Board made clear that it knew that this issue was material to shareholders, yet it withheld the truth about Harrison's medical condition and physical limitations. This was a material omission made worse by the fact that the Board purported to address the issue but made no disclosure of any problem or limitation or the risk of any problem or limitation.

The Board Approves Harrison's "Reimbursement" Request

On June 5, 2017, CSX held its annual shareholder meeting. Based on the misleading proxy statements of the Board and Hilal, the shareholders in favor of electing the new directors and approving the $84 million reimbursement payment to Harrison. At the time, shareholders still did not have the full truth concerning Harrison's health and medical condition.

On June 16, 2017, following the shareholder approval, the Board announced that it agreed to Harrison's $84 million "reimbursement" request. By Harrison's own admission to the *Wall Street Journal*—which was never contradicted by CSX—**the Board had full knowledge of his health and medical condition and his physical limitations at this time.** Harrison had been at CSX for several months, and it would have been reckless and/or grossly negligent for the Company to have not known of his true medical condition.

The Board's knowledge that Harrison had a serious health issue is reflected in its June 16, 2017 Form 8-K filed to acknowledge that it had agreed to the reimbursement. In describing the factors weighing on its decision, the Board mentioned for the first time the risks associated with Harrison's age and health. The Board also added this generalized disclaimer (which does not acknowledge or admit any specific health condition) that never appeared in any of the preceding proxy statements or shareholder communications:

> The pace of implementing Mr. Harrison's business strategies, including Precision Scheduled Railroading, depends on numerous factors, including his continued availability and service. Continued availability and service can never be guaranteed for any individual and is a particular risk in the case of Mr. Harrison, who is 72 years old and has experienced medical issues at various times, including a respiratory condition that requires him to use supplemental oxygen. **An extended or permanent loss of the services of Mr. Harrison, due to death, disability or any other reason, could adversely disrupt the pace of implementing the company's Precision Scheduled Railroading, or otherwise adversely affect the Company or the market price of the Company's securities.** (emphasis added)

The Board's decision to approve the $84 million reimbursement payment was reckless and/or grossly negligent considering the state of Harrison's health. The Board knew that Harrison's tenure would be short-lived, and that there was, therefore, an extremely high probability that he would not be able to implement his turnaround strategy.

Harrison Shocks Market on the Second Quarter 2017 Earnings Call

On July 18, 2017, Harrison spoke on CSX's analyst conference call. During the call he stated, "I'm a short-timer here. I'm the interim person that's going to try to get this company to the next step and good foundation." He also acknowledged that "I think it's very reasonable to say that we can get this done in the timeframe we talked about which is I guess 2020 we will have it done by then, I think it's very reasonable." He also discussed a difficulty he faced that he could not recruit past members of his team who were familiar with implementing his strategies.

His comments shocked the market and investors. The *Jacksonville Business Journal* reported on his comments in an article titled "CSX CEO Drops Bombshell During Earnings Call." CSX's stock price fell by approximately 10%.

Harrison's statements to analysts sharply contradicted the primary thrust and arguments made by the Board and Mantle Ridge for shareholders to support the $84 million reimbursement payment and to elect the new directors from Mantle Ridge. Shareholders were never advised or told that Harrison was only an "interim CEO" or that his tenure was likely to be short. Instead, they were advised that he was necessary for CSX's turnaround

plan, which would take multiple years to implement, and that no one else was remotely qualified to carry out this plan. Shareholders were also never advised or informed of any health issues or condition that would limit his capability of executing his plans to fruition.

Harrison Takes Sudden Medical Leave from CSX and Passes Away

On December 13, 2017, CSX abruptly announced that Harrison was taking a "medical leave" from the Company. The leave was explained as "unexpected complications from a recent illness" and CSX's acting CEO had no timetable for Harrison's expected return. In response to this news, CSX's stock price fell another 10%.

According to a *Florida Times-Union* article dated December 14, 2017, at a Credit Suisse conference two weeks ago, Harrison hinted at a succession plan, saying that he was "trying to stay back a little bit" and let other executives take more control. "I am there to help if they need me," Harrison said, according to news reports. "But at the same time ... this company's got to be ready to deal, and it is going to be ready to deal, without Hunter Harrison. And that's one of the steps in the succession." Harrison's remarks evidence the Board's full awareness and preparations for his demise.

On December 15, 2017, two days later, Harrison passed away, causing further declines to CSX's stock price. CSX's Chairman stated that the company suffered a "major loss." Industry analysts have described Harrison as irreplaceable and have questioned CSX's ability to continue its turnaround plans to increase operating efficiency without Harrison leading the Company.

Demands for Relief

In sum, the Board has engaged in reckless and grossly negligent actions in connection with Harrison's hiring and compensation that constitute at a minimum breaches of their fiduciary duties to the Company. These acts include the failure to properly vet Harrison's medical condition before agreeing to his demands, the reckless agreement to Harrison's wasteful compensation demands and the demand to add conflicted Board members, and the false and misleading proxy statements filed in connection with the Special Advisory Vote on Harrison's "reimbursement" compensation (as well as the new Board member election). These actions have caused severe harm and damage to CSX and require immediate remedy.

To restore integrity to the Company and recover the waste incurred by these wrongful acts, the following actions are demanded:

- The Board members immediately announce their resignations and schedule a Special Election for the appointment of new, unconflicted directors;

- The Board causes an independent investigation to be made with respect to the alleged reckless and/or grossly negligent actions and misconduct described above;

- The Board take action to collect from current Board members, Harrison's estate, Mantle Ridge LP and/or any other potentially liable parties reimbursement of compensation paid to or on behalf of Harrison, including any "reimbursement" compensation, including litigation if preliminary efforts are not successful;

- Previous CSX by-law provisions governing the age of its CEO and/or requiring pre-hiring health reviews as a condition for employment and/or annual health reviews as a condition for compensation be immediately restored;

- The Board institute corporate governance provisions that limit or benchmark CEO and other senior executive total compensation so that it is not excessive;

- The Board cause an accounting to be provided to shareholders for all related and consequential expenses and costs incurred by CSX, including costs for proxy statements, in relation to Harrison's hiring and tenure;

- The Board institute further corporate governance initiatives to ensure that such conduct and damage to the Company as described above does not recur;

- The Board direct CSX to produce its relevant "books and records" necessary to elucidate the full extent of the involvement of the Board members and any other persons in the wrongdoing described herein so that appropriate action can action.

This relief is the minimum necessary to repair the damage caused to CSX and its shareholders at this time.

Request for Documents

In addition to the Demand set forth above, we request that CSX produce its relevant "books and records" that bear on the issues raised in this Demand pursuant to Va. Code Ann. § 13.1-771. A list of the records sought is attached hereto as **Exhibit E.** These records are necessary to evaluate the extent of the breaches of fiduciary duties owed by the officers and directors. We plan to evaluate the books and records produced in response to determine whether the Board's response to this Demand is sufficient and whether litigation or some other follow-up is necessary to remedy the Board's misconduct.

Please advise us within ninety (90) days as to CSX's position with respect to the Demand, and within five (5) business days as to when and where the books and records sought will be made available. Mr. Robertson intends to avail himself fully of the remedies provided at law and in equity if the Company's responses are uncooperative, untimely or insufficient.

Very truly yours,

Jacob H. Zamansky

JHZ/tg
Enclosures

cc: Ellen M. Fitzsimmons,
General Counsel and Corporate Secretary

Appendix A

§ 13.1-603. Definitions

In this chapter:

"Articles of incorporation" means all documents constituting, at any particular time, the charter of a corporation. It includes the original charter issued by the General Assembly, a court or the Commission and all amendments including certificates of consolidation, serial designation, reduction, correction, and merger. It excludes articles of share exchange filed by an acquiring corporation. When the articles of incorporation have been restated pursuant to any articles of restatement, amendment, domestication, or merger, it includes only the restated articles of incorporation, including any articles of serial designation, without the accompanying articles of restatement, amendment, domestication, or merger.

"Authorized shares" means the shares of all classes a domestic or foreign corporation is authorized to issue.

"Certificate," when relating to articles filed with the Commission, means the order of the Commission that makes the articles effective, together with the articles.

"Commission" means the State Corporation Commission of Virginia.

"Conspicuous" means so written, displayed, or presented that a reasonable person against whom the writing is to operate should have noticed it. For example, text that is italicized, is in boldface, contrasting colors, or capitals, or is underlined, is conspicuous.

"Corporation" or "domestic corporation" means a corporation authorized by law to issue shares, irrespective of the nature of the business to be transacted, organized under this chapter or existing pursuant to the laws of the Commonwealth on January 1, 1986, or which, by virtue of articles of incorporation, amendment, or merger, has become a domestic corporation of the Commonwealth, even though also being a corporation organized under laws other than the laws of the Commonwealth, or that has become a domestic corporation of the Commonwealth pursuant to Article 12.1 (§ 13.1-722.2 et seq.) of this chapter or Article 15 (§ 13.1-1081 et seq.) of Chapter 12.

"Deliver" or "delivery" means any method of delivery used in conventional commercial practice, including delivery by hand, mail, commercial delivery, and, if authorized in accordance with § 13.1-610, electronic transmission.

"Derivative proceeding" means a civil suit in the right of a domestic corporation or, to the extent provided in Article 8.1 (§ 13.1-672.1 et seq.) of Chapter 9 of this title, a foreign corporation.

"Disinterested director" means, except with respect to Article 14 (§ 13.1-725 et seq.) of this chapter, a director who, at the time action is to be taken under § 13.1-672.4, 13.1-691, 13.1-699 or 13.1-701, does not have (i) a financial interest in a matter that is the subject of such action or (ii) a familial, financial, professional, employment or other relationship with a person who has a financial interest in the matter, either of which would reasonably be expected to affect adversely the objectivity of the director when participating in the action, and if the action is to be taken

under § 13.1-699 or 13.1-701, is also not a party to the proceeding. The presence of one or more of the following circumstances shall not by itself prevent a person from being a disinterested director: (i) nomination or election of the director to the current board by any person, acting alone or participating with others, who is so interested in the matter; (ii) service as a director of another corporation of which an interested person is also a director; or (iii) at the time action is to be taken under § 13.1-672.4, status as a named defendant, as a director against whom action is demanded, or as a director who approved the act being challenged.

"Distribution" means a direct or indirect transfer of money or other property, except its own shares, or incurrence of indebtedness by a corporation to or for the benefit of its shareholders in respect of any of its shares. A distribution may be in the form of a declaration or payment of a dividend; a purchase, redemption, or other acquisition of shares; a distribution of indebtedness of the corporation; or otherwise. Distribution does not include acquisition by a corporation of its shares from the estate or personal representative of a deceased shareholder, or any other shareholder, but only to the extent the acquisition is effected using the proceeds of insurance on the life of such deceased shareholder and the board of directors approved the policy and the terms of the redemption prior to the shareholder's death.

"Document" means (i) any tangible medium on which information is inscribed, and includes any writing or written instrument, or (ii) an electronic record.

"Domestic business trust" has the same meaning as specified in § 13.1-1201.

"Domestic limited liability company" has the same meaning as specified in § 13.1-1002.

"Domestic limited partnership" has the same meaning as specified in § 50-73.1.

"Domestic nonstock corporation" has the same meaning as "domestic corporation" as specified in § 13.1-803.

"Domestic partnership" means an association of two or more persons to carry on as co-owners a business for profit formed under § 50-73.88, or predecessor law of the Commonwealth, and includes, for all purposes of the laws of the Commonwealth, a registered limited liability partnership.

"Effective date of notice" is defined in § 13.1-610.

"Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

"Electronic record" means information that is stored in an electronic or other medium and is retrievable in paper form through an automated process used in conventional commercial practice, unless otherwise authorized in accordance with subsection J of § 13.1-610.

"Electronic transmission" or "electronically transmitted" means any form or process of communication, not directly involving the physical transfer of paper or other tangible medium, that (i) is suitable for the retention, retrieval, and reproduction of information by the recipient, and (ii) is retrievable in paper form by the recipient through an automated process used in conventional commercial practice, unless otherwise authorized in accordance with subsection J of § 13.1-610.

"Eligible entity" means a domestic or foreign unincorporated entity or a domestic or foreign

nonstock corporation.

"Eligible interests" means interests or memberships.

"Employee" includes, unless otherwise provided in the bylaws, an officer but not a director. A director may accept duties that make him also an employee.

"Entity" includes any domestic or foreign corporation; any domestic or foreign nonstock corporation; any domestic or foreign unincorporated entity; any estate or trust; and any state, the United States and any foreign government.

"Foreign business trust" has the same meaning as specified in § 13.1-1201.

"Foreign corporation" means a corporation authorized by law to issue shares, organized under laws other than the laws of the Commonwealth.

"Foreign limited liability company" has the same meaning as specified in § 13.1-1002.

"Foreign limited partnership" has the same meaning as specified in § 50-73.1.

"Foreign nonstock corporation" has the same meaning as "foreign corporation" as specified in § 13.1-803.

"Foreign partnership" means an association of two or more persons to carry on as co-owners of a business for profit formed under the laws of any state or jurisdiction other than the Commonwealth, and includes, for all purposes of the laws of the Commonwealth, a foreign registered limited liability partnership.

"Foreign registered limited liability partnership" has the same meaning as specified in § 50-73.79.

"Foreign unincorporated entity" means an unincorporated entity whose internal affairs are governed by an organic law of a jurisdiction other than the Commonwealth.

"Government subdivision" includes authority, county, district, and municipality.

"Includes" denotes a partial definition.

"Individual" means a natural person.

"Interest" means either or both of the following rights under the organic law of an unincorporated entity:

1. The right to receive distributions from the entity either in the ordinary course or upon liquidation; or

2. The right to receive notice or vote on issues involving its internal affairs, other than as an agent, assignee, proxy or person responsible for managing its business and affairs.

"Means" denotes an exhaustive definition.

"Membership" means the rights of a member in a domestic or foreign nonstock corporation or limited liability company.

"Notice" is defined in § 13.1-610.

"Organic document" means the document, if any, that is filed of public record to create an

unincorporated entity. Where an organic document has been amended or restated, the term means the organic document as last amended or restated.

"Organic law" means the statute governing the internal affairs of a domestic or foreign corporation or eligible entity.

"Person" includes an individual and an entity.

"Principal office" means the office, in or out of the Commonwealth, where the principal executive offices of a domestic or foreign corporation are located, or, if there are no such offices, the office, in or out of the Commonwealth, so designated by the board of directors. The designation of the principal office in the most recent annual report filed pursuant to § 13.1-775 shall be conclusive for purposes of this chapter.

"Proceeding" includes civil suit and criminal, administrative, and investigatory action conducted by a governmental agency.

"Public corporation" means a corporation that has shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national or affiliated securities association.

"Record date" means the date established under Article 7 (§ 13.1-638 et seq.) or Article 8 (§ 13.1-654 et seq.) of this chapter on which a corporation determines the identity of its shareholders and their shareholdings for purposes of this chapter. The determination shall be made as of the close of business at the principal office of the corporation on the record date unless another time for doing so is specified when the record date is fixed.

"Shareholder" means the person in whose name shares are registered in the records of the corporation, the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation, or the beneficial owner of shares held in a voting trust.

"Shares" means the units into which the proprietary interests in a corporation are divided.

"Sign" or "signature" means, with present intent to authenticate or adopt a document: (i) to execute or adopt a tangible symbol to a document, and includes any manual, facsimile, or conformed signature; or (ii) to attach to or logically associate with an electronic transmission an electronic sound, symbol, or process, and includes an electronic signature in an electronic transmission.

"State" when referring to a part of the United States, includes a state, commonwealth, and the District of Columbia, and their agencies and governmental subdivisions; and a territory or insular possession, and their agencies and governmental subdivisions, of the United States.

"Subscriber" means a person who subscribes for shares in a corporation, whether before or after incorporation.

"Subsidiary" means, as to any corporation, any other corporation of which it owns, directly or indirectly, voting shares entitled to cast a majority of the votes entitled to be cast generally in an election of directors of such other corporation.

"Unincorporated entity" or "domestic unincorporated entity" means a domestic partnership, limited liability company, limited partnership or business trust.

"United States" includes district, authority, bureau, commission, department, and any other agency of the United States.

"Voting group" means all shares of one or more classes or series that under the articles of incorporation or this chapter are entitled to vote and be counted together collectively on a matter at a meeting of shareholders. All shares entitled by the articles of incorporation or this chapter to vote generally on the matter are for that purpose a single voting group.

"Voting power" means the current power to vote in the election of directors.

"Writing" or "written" means any information in the form of a document.

Code 1950, § 13.1-2; 1956, c. 428; 1962, c. 44; 1975, c. 500; 1985, c. 522; 1992, cc. 575, 802; 1993, c. 200; 1994, c. 122;1997, cc. 190, 801;2001, c. 545;2002, cc. 1, 285;2003, cc. 340, 728;2005, c. 765; 2006, c. 663;2007, c. 165;2010, c. 782;2012, c. 706;2015, c. 611;2016, c. 288.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Code of Virginia
Title 13.1. Corporations
Chapter 9. Virginia Stock Corporation Act

§ 13.1-672.1. Standing; condition precedent; stay of proceedings

A. A shareholder shall not commence or maintain a derivative proceeding unless the shareholder:

1. Was a shareholder of the corporation at the time of the act or omission complained of;

2. Became a shareholder through transfer by operation of law from one who was a shareholder at that time; or

3. Became a shareholder before public disclosure and without knowledge of the act or omission complained of; and

4. Fairly and adequately represents the interests of the corporation in enforcing the right of the corporation.

B. No shareholder may commence a derivative proceeding until:

1. A written demand has been made on the corporation to take suitable action; and

2. Ninety days have expired from the date delivery of the demand was made unless (i) the shareholder has been notified before the expiration of 90 days that the demand has been rejected by the corporation or (ii) irreparable injury to the corporation would result by waiting until the end of the 90-day period.

C. If the corporation commences a review and evaluation of the allegations made in the demand or complaint, the court may stay any derivative proceeding for such period as the court deems appropriate.

1992, c. 802; 2007, c. 165;2010, c. 782.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

§ 13.1-672.4. Dismissal

A. A derivative proceeding shall be dismissed by the court on motion by the corporation if one of the groups specified in subsection B or E has:

1. Conducted a review and evaluation, adequately informed in the circumstances, of the allegations made in the demand or complaint;

2. Determined in good faith on the basis of that review and evaluation that the maintenance of the derivative proceeding is not in the best interests of the corporation; and

3. Submitted in support of the motion a short and concise statement of the reasons for its determination.

B. Unless a panel is appointed pursuant to subsection E, the determination in subsection A shall be made by:

1. A majority vote of disinterested directors present at a meeting of the board of directors if the disinterested directors constitute a quorum; or

2. A majority vote of a committee consisting of two or more disinterested directors appointed by a majority vote of disinterested directors present at a meeting of the board of directors, whether or not such disinterested directors constituted a quorum.

C. If a derivative proceeding has been commenced after a determination has been made rejecting a demand by a shareholder, the complaint shall allege with particularity facts establishing that the requirements of subsection A have not been met. The plaintiff shall be entitled to discovery with respect to the issues presented by the motion only if and to the extent that the complaint alleges such facts with particularity.

D. The plaintiff shall have the burden of proving that the requirements of subsection A have not been met, except that the corporation shall have the burden with respect to the issue of independence under subsection B if the complaint alleges with particularity facts raising a substantial question as to such independence.

E. The court may appoint a panel of independent persons upon motion by the corporation to make a determination whether the maintenance of the derivative proceeding is in the best interests of the corporation.

1992, c. 802; 1993, c. 233; 2005, c. 765.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

§ 13.1-690. General standards of conduct for director

A. A director shall discharge his duties as a director, including his duties as a member of a committee, in accordance with his good faith business judgment of the best interests of the corporation.

B. Unless he has knowledge or information concerning the matter in question that makes reliance unwarranted, a director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by:

1. One or more officers or employees of the corporation whom the director believes, in good faith, to be reliable and competent in the matters presented;

2. Legal counsel, public accountants, or other persons as to matters the director believes, in good faith, are within the person's professional or expert competence; or

3. A committee of the board of directors of which he is not a member if the director believes, in good faith, that the committee merits confidence.

C. A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section.

D. A person alleging a violation of this section has the burden of proving the violation.

Code 1950, §§ 13-206, 13-207, 13.1-44; 1956, c. 428; 1985, c. 522.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.